

OGC 73-1744

19 September 1973

MEMORANDUM FOR: Acting Chief, East Asia Support

SUBJECT : Foreign Post Differential on Terminal
Leave Payment

REFERENCE : Memorandum to OGC fr AC/EA/Support,
dtd 20 Aug 73, same subject

1. You requested an opinion from this Office concerning a former employee's eligibility to receive the 25 per cent Vietnam post differential in his lump-sum payment incident to his separation from Agency service. It is understood that this individual was assigned to Vietnam but departed Vietnam in a leave status on 12 February 1973 for a nearby country, where he retired on 1 April 1973. The employee now claims that he was not advised that if he was physically present in Vietnam on his retirement date, the foreign post differential would be included in his lump-sum leave payment. This individual has written to Mr. Colby asking that the foreign post differential be added to the lump-sum leave payment he received. At the time the employee retired, the Agency had not adopted the administrative provision of the Federal Personnel Manual which authorizes a differential to be included in an employee's lump-sum leave payment. Therefore, this Office is of the opinion that the employee is not entitled to the payment he seeks.

2. The differential here in question is paid under 5 U.S.C.A. 5925, which was derived from the Overseas Differentials and Allowances Act (P.L. 86-707, Sept. 6, 1960) and the Standardized Regulations (Government Civilians, Foreign Areas) issued by the Department of State pursuant to the Act. The Standardized Regulations permit the head of an agency to grant a foreign post differential to

STAT his employees and to issue further implementing regulations as are necessary for the guidance of his agency with regard to the granting of and accounting for these payments. Chapter 13, Standardized Regulations. Agency Headquarters Regulations (HR) allow differentials to be paid at posts in foreign areas covered by the Standardized Regulations. [REDACTED]; See Chapter 920 of the Standardized Regulations for a listing of the foreign posts where a differential may be paid.

3. The inclusion of a differential in a lump-sum payment is dependent upon the differential being additional pay and not in the nature of a reimbursement for expenses incurred. Chapter 511a of the Standardized Regulations treats a foreign post differential as additional pay, and thus, it is to be considered in determining an employee's lump-sum payment, if otherwise authorized by the regulation. Chapter 532 of the Standardized Regulations provides, in effect, that the employee's entitlement to the foreign post differential terminates as of the close of business on the date of separation, if not terminated earlier for some other reason listed in Chapter 532, such as departure from the post under orders for transfer or separation. This language does not specifically allow or prohibit the inclusion of the foreign differential in the employee's lump-sum leave payment.

4. The Department of State and the Civil Service Commission have had conflicting positions with regard to the lump-sum payment at issue. The State Department provides that a "p/ost differential shall not be included in any lump-sum leave payment, except for settlement of a deceased Foreign Service employee's accounts." 3 FAM (Foreign Service Personnel) 372. The Civil Service Commission provides that "a/n employee separated at (emphasis in text) his overseas post of assignment for which a differential . . . is authorized is entitled to have the differential included in his lump-sum payment (32 Comp. Gen. 323)." The Commission also provides that an employee who ". . . is separated after (emphasis in text) he leaves the overseas post, a differential . . . which he may have been receiving is not included in his final pay or lump-sum leave payment

(38 Comp. Gen. 594 and 33 id. 287)." Subchapter S2-3.f, Book 550, FPM Supp. 990-2. The Comptroller General Decisions referred to in the FPM concern employees apparently covered by the Civil Service System, whose posts would now be considered to be in non-foreign areas. The Civil Service Commission, under the authority of 5 U.S.C.A. 5941, may designate the posts in non-foreign areas where a differential may be paid.

5. This Agency apparently has never paid an employee retiring at a foreign or a non-foreign differential post a lump-sum leave payment which included the differential, and apparently this issue has never been raised. Unlike the State Department and Civil Service Commission, Agency Headquarters Regulations [REDACTED] [REDACTED] are completely silent on this issue. In keeping with its policy to try to provide its employees the maximum benefits consonant with the law, the Agency began to re-examine its policy in early May, 1973. It was determined at that time to pay the differential to employees as part of their lump-sum leave payment, if they were physically at their duty post on the date of their separation. A cable expressing the new policy was sent to Vietnam on 10 May 1973. The policy is effective from this date, and no retroactive application has been or need be made.

6. The Comptroller General of the United States has recently ruled that two employees of the Agency for International Development (AID) were entitled to the inclusion of the foreign post differential in their lump-sum leave payments incident to their separation from federal service in Laos. In the opinion, the Comptroller General states, with regard to the Foreign Service (and AID) Regulations, that:

Although the matter is not entirely free from doubt, we feel that the better view is that an employee separated at a foreign post should have his lump sum computed on the basis of continued service at the foreign post for the period covered by the lump sum payment.

Therefore, the differential applicable to service in Vientiane should be included in the lump sum leave payments.... You may wish to take the actions necessary to revise the regulations concerned.... [REDACTED] June 28, 1973.

The undersigned has learned from Mr. Stormer, Department of State, that the Department is rewriting 3 FAM 372 to bring it in line with the 28 June 1973 decision. The Agency is preparing a revision for its appropriate Headquarters Handbook, reflecting its adoption of this policy effective 10 May 1973.

7. The undersigned spoke to Mr. Monsma, General Counsel's Office, General Accounting Office, on 12 September 1973. Mr. Monsma wrote the 28 June opinion cited above. I explained to him the question posed by our former employee. He was of the opinion that there was no need for the Agency's 10 May decision to have any retroactive application. Therefore, the employee in question is not entitled to the foreign post differential in his lump-sum leave payment incident to his separation because the payment in question was not authorized by the Agency until after the employee retired.

8. Mr. Monsma and I also discussed the meaning of the word "at" as it is used in the Federal Personnel Manual and in the Comptroller General decisions. He agreed that the word "at" means "physically at" the differential post on the date of separation. We discussed an analagous case found at 33 Comp. Gen. 287 (1954). In this case, the employee was granted leave incident to separation and his return to an active duty status at the conclusion of the leave (taken at a place other than the post of duty) was not contemplated. The Comptroller General held that his departure from the post was of a permanent nature and that "...it must be recognized that the pending separation was the proximate cause of the departure from the post of duty, so as to bring into operation the allowance termination...." 33 Comp. Gen. at 288. Therefore, the Agency requirement that an employee be physically at his duty post on the date of his separation in order to receive the differential as part of his lump-sum leave payment is in keeping with the applicable law on this issue.

STATINTL

Office of General Counsel

10/8/74

cc: SSA/DDM&S

D/OP

D/OF

OGC: AEG:cap

Original - Addressee

✓ 1 - ALLOWANCES

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Approved For Release 2003/12/02 : CIA-RDP75-00793R000100220004-1

1 - AEG Signer

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REC 8/21/73
OGC 73 1571

MEMORANDUM FOR : Office of General Counsel

SUBJECT : Post Differential Included on Terminal Leave
Payment - [REDACTED]

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25X1A 1. To assist us in writing a response to the attached letter from [REDACTED] to Mr. Colby, an OGC opinion is requested regarding M [REDACTED] eligibility to receive the 25% Vietnam post differential on his terminal leave payment.

25X1A 2. [REDACTED] was assigned to the Vietnam Station, and his wife was [REDACTED] departed Vietnam on 12 February 1973 and returned to [REDACTED] where he retired under CIARDS, effective 1 April 1973. Shortly thereafter, [REDACTED] returned to Vietnam and accepted employment with the Department of Army on 16 April 1973.

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25X1A 3. [REDACTED] states that the Personnel Office did not advise him that if he was physically present in Vietnam on his retirement date he would qualify for the differential payment on his accrued annual leave. We should, however, clarify that the Vietnam Station Personnel Office was not aware of the revision to the Federal Personnel Manual, which authorized this payment, until immediately before the Station forwarded [REDACTED] which requested Headquarters guidance on this subject.

25X1A 4. To assist you in your review of this case, we have attached a copy of [REDACTED] a copy of Headquarters response - [REDACTED] and a copy of the Supplement to the FPM. Since our response to [REDACTED] must be prepared for Mr. Colby's signature, we would appreciate an early response.

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[REDACTED]
Acting Chief, East Asia Support

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E. 2 IMPDET CL [REDACTED]

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OGC 73-1571

ROUTING AND RECORD SHEET				
SUBJECT: (Optional)				
FROM:		EXTENSION	NO.	
AC/EA/SUPPORT			DATE	
				20 August 1973
TO: (Officer designation, room number, and building)	DATE		OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
	RECEIVED	FORWARDED		
1. OGC 7-D-01	8/21/73			Reference attached hereto returned w/OGC 73-1744 to AC/East Asia Support 9/20/73
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